



**"DRAFT RECOMMENDATIONS FOR PURPOSES OF NEGOTIATING A
CONSENT DECREE"**

February 10, 2015

NORMAN S. MINOR BAR ASSOCIATION

On behalf of its membership, NSMBA submits DRAFT recommendations and suggestions to the Department of Justice and the City of Cleveland for purposes of negotiating the Consent Decree as a result of the December 4, 2014 Department of Justice's finding of a pattern and practice of excessive force within the Cleveland Police Department.

Visit the NSMBA website at:

www.nsmba.org

INDEX

I. **RECOMMENDATIONS FOR DEVELOPING AN OFFICE OF THE
INSPECTOR GENERAL FOR CLEVELAND POLICE DEPARTMENT
("OIGPD")**

By: Marlon Primes, Esq. and Carolyn Watts-Allen, Esq.

Page 3

II. **RECOMMENDATIONS FOR CITIZENS REVIEW BOARD**

By: Judge Emanuella Groves, Sandra Curtis-Patrick, Esq. and Gary Cook, Esq

Page 5

III. **RECOMMENDATIONS FOR ADDRESSING THE COLLECTIVE
BARGAINING AGREEMENT BETWEEN THE CLEVELAND POLICE
DEPARTMENT AND THE UNION**

By: Angela L. Simmons, Esq.

Page 11

**RECOMMENDATIONS FOR DEVELOPING AN
OFFICE OF THE INSPECTOR GENERAL FOR CLEVELAND POLICE
DEPARTMENT (“OIGPD”)**

By: Marlon Primes, Esq. and Carolyn Watts-Allen, Esq.

- I. Appointment. The Mayor of the City of Cleveland (“Mayor”) shall solicit applications from the community and nominate an Inspector General for the Cleveland Police Department (OIGPD). This nomination must be approved by a majority of the members of the Cleveland City Council (“City Council”). The OIGPD and all candidates for OIGPD must be licensed to practice law in the State of Ohio for more than eight years and have experience litigating police misconduct and/or excessive-force cases.
- II. Term. The OIGPD will serve for a term of six years. The OIGPD can serve more than one term after nomination by the Mayor and confirmation by City Council.
- III. Removal. The OIGPD can be removed from office before the completion of any full term upon proof of serious misconduct and/or dereliction of duty. Any removal of the OIGPD must be approved by the Mayor and a majority of the members of City Council.
- IV. Duties. The OIGPD shall have authority to investigate all claims of serious misconduct by members of the Cleveland Police Department (“CPD”), including claims of bodily injury and/or excessive force. The OIGPD must investigate all findings from any state or federal judicial officer that a member of the CPD engaged in perjury, excessive force, and/or serious misconduct that could result in a felony. The OIGPD shall also investigate internal complaints of serious misconduct, excessive force, and/or perjury that members of the CPD have lodged against other members of the CPD.
- V. Investigations. The OIGPD shall establish training for members of the CPD to ensure they are aware of the following procedures for OIGPD investigations:
 - a. Duty to cooperate. CPD employees have a duty to, and shall, cooperate fully with the OIGPD investigations. CPD employees who refuse to cooperate with an OIGPD investigation may be subject to formal discipline, up to and including removal.
 - b. Duty to Report. CPD employees have a duty to report non-frivolous misconduct of fellow CPD employees. CPD employees who refuse to do so may be subject to formal discipline, up to and including removal.
 - c. Interference. CPD employees cannot interfere with OIGPD investigation and/or subpoenas. CPD employees who refuse to do so may be subject to formal discipline, up to and including removal.
 - d. Confidentiality. All OIGPD proceedings will remain confidential during the pendency of the OIGPD investigation. However, if the OIGPD determines that the accused member of the CPD engaged in perjury, excessive force, and/or serious

misconduct that could result in a felony, the OIGPD's findings must be made public.

- VI. Reports. The OIGPD shall complete an annual report that details the number of CPD complaints that allege perjury, excessive force, and/or serious misconduct that could result in a felony. The report shall also detail how the complaint was resolved, how long it took to resolve the complaint, and whether the CPD member was disciplined, recommended for prosecution, and/or prosecuted. The report shall also detail whether the complainant alleged discrimination on the basis of race, religion, ethnicity, sexual orientation, and/or membership in any other recognized protected class.
- VII. Disciplinary Recommendation and/or Referral to Prosecuting Authorities.
 - i. At the conclusion of an OIGPD investigation, the OIGPD can recommend that the CPD employee be disciplined, discharged, and/or referred to the appropriate authorities for prosecution.
 - ii. The Mayor, City Council, and/or the Cleveland Safety Director cannot interfere with and/or overrule the OIGPD's recommendation that a member of the CPD be referred for prosecution.
 - iii. When the OIGPD cannot substantiate the allegations in a complaint, the matter can be dismissed or referred back to the CPD as a management issue.
- VIII. Coordination with Citizens Review Board.
 - i. The OIGPD will cooperate with and not interfere with the work of the Citizens Review Board, which investigates allegations of CPD misconduct that do not rise to the level of a felony.
- IX. Funding
 - i. The OIGPD shall submit a budget for the operation of its office to the City Council. The City Council shall not fail to approve an OIGPD budget for any year the office is in existence. The City Council shall use their best efforts to ensure adequate funding for the operation of the OIGPD's office so that it can carry out its duties and responsibilities.

RECOMMENDATIONS FOR A CITIZENS REVIEW BOARD

By: Judge Emanuella Groves, Sandra Curtis-Patrick, Esq. and Gary Cook, Esq

FIRST AMENDMENT RIGHT

Citizen's complaints against police officers are a Constitutional right Under the First Amendment. They are an expression of the right to "petition government for a redress of grievances". Any attempt to restrict or even deny that right would be a violation of the First amendment. The Complainant has a First Amendment right to make the allegation if he or she feels the level of force was excessive. It is the function of the complaint investigation process to decide the truth of the matter and to make a determination. A citizen cannot be denied the right to make an assertion he or she believes to be true.

I. PURPOSE AND MISSION OF A CITIZEN REVIEW BOARD

The civilian oversight body's foremost responsibilities are to ensure the independence and comprehensiveness of civilian oversight, to assess the performance of police officers, the accountability system, and to recommend and approve changes.

II. ESSENTIAL CHARACTERISTICS OF AN EFFECTIVE CITIZEN REVIEW BOARD

a. Broadly Representative of Diverse Communities

The size of the civilian oversight body must be sufficient to provide for a wide range of public perspectives and to perform the large body of work assigned to the body, but not so large as to be unwieldy.

Many members should be drawn from communities that have had difficulties in their interactions with the Cleveland Police Department. They should be from different racial and ethnic groups; represent youth, LGBT communities, and those who serve the homeless or community members who have mental illness and substance abuse disorders.

Members should also include a representative of the, Cleveland Police Unions, representatives from Management in the Cleveland Police Department, as well as representatives from the faith and business communities.

b. Skills and Expertise

To be effective, members of a civilian oversight body must also each bring a depth of expertise and/or previous involvement in these issues, and should be committed to Constitutional policing, with a deep understanding of the interests and needs of both the broad community and law enforcement.

Members should have a reputation for integrity and significant standing in each of their respective communities.

The body should include members with sufficient ongoing credibility on issues of policing and civil rights to ensure that those who have been skeptical or critical of law enforcement feel that they have a strong voice at the table.

All should have substantial knowledge of police accountability matters and police-community issues

III. THE CITIZEN COMPLAINT PROCESS

Police departments have a duty to investigate complaints against their officers in a thorough, fair and unbiased manner, and to impose appropriate discipline when complaints are substantiated.

Complaints against officers should come from at least four different sources: Citizen's complaints initiated by citizens; Public defender; Criminal defense attorneys; and Internal complaints filed by supervisors or other officers.

a. Essential Characteristics of the Citizen Complaint Process

The Citizens Review Board should have effective complaint reception protocols and investigative procedures.

1. A single complaint may contain several allegations, including allegations against several officers.
2. Complaints may be investigated by internal affairs and they may be investigated by citizen review boards.
3. The Citizens Review Board in the Cleveland Consent Decree should have original jurisdiction for investigating complaints.
4. The investigative process should also have specific time frames for completion, with complainants notified of any delays.
5. The complaint process should include:
 - i. A description of the formal complaint process,
 - ii. How and where to file a complaint,
 - iii. The complaint forms themselves, and
 - iv. A summary of what a complainant can expect in the way of possible outcome, including a final disposition.
6. Citizens should be informed of the steps that will be taken to follow up on the complaint and should also be informed of the outcome.

b. Informing the Public about the Citizen Complaint Process

The first consideration for an open and accessible complaint procedure involves publicizing the process and informing citizens about how to file a complaint.

The information provided relative to the complaint filing process should inform the public about Cleveland Police functions, standards, and procedures, including motor vehicle stops, searches and seizures, and the methods for reporting civilian complaints or compliments regarding officers.

c. Making Information Available In All Relevant Languages

Cleveland has an immigrant community that may have limited command of the English language or who do not speak English at all. To serve these communities citizen complaint procedures need to provide informational material in all the languages spoken in the community.

IV. INVESTIGATING COMPLAINTS

a. Accepting and Classifying Complaints

Accepting and classifying complaints is the first stage in the complaint investigation process. Accepting a complaint involves recording it and assigning a complaint number. Recording and numbering complaints ensures accountability.

Once a complaint has been accepted, it has to be classified and assigned to an investigator. Complaints are usually classified by level of seriousness.

San Jose Citizen Review Board uses three categories of complaints:

1. Conduct Complaints involve allegations that an officer or officers violated one or more departmental rules, and are investigated by internal affairs;
2. Policy Complaints involve a complaint against the policies or procedures of the police department and are not directed against an officer;
3. Misconduct Concerns involve minor issues about an officer that would not result in discipline.

The New York City Citizen Complaint Review Board uses four categories of complaints:

1. Force,
2. Abuse of Authority,
3. Discourtesy, and
4. Offensive Language.

Best practices dictate that all complaints be officially recorded regardless of the seriousness or merits of the allegation, with an official complaint number. These data will provide a complete picture of the number of incidents where someone sought to record his or her dissatisfaction with some aspect of police service. Once formally recorded, complaints can then be screened and classified appropriately.

b. Ensuring Thorough and Fair Investigations

The following is a list of considerations to assess the thoroughness of investigations by Citizen Review Boards. This information was sourced from the San Jose, Independent Police Auditor, Policy and Procedures.

1. Were all the identified witnesses interviewed? If not, why? The Review Board shall send a request to conduct the missed interviews or receive an explanation of what efforts were made to interview these witnesses.
2. What efforts were made by the investigator(s) to find additional witnesses?
3. Was a neighborhood canvas conducted?
4. Were leads from the complainant or other witnesses developed?
5. Did the investigation include any photographs or diagrams?
6. Was the investigator objective in writing the final comprehensive report?
7. Were consistencies and inconsistencies between civilian witnesses pointed out?
8. Were consistencies and inconsistencies between police officers also pointed out?
9. Were the facts represented as represented in the investigators reports consistent with the contents of the taped interviews?

c. Locating and Interviewing Witnesses

Failure to locate and interview witnesses is a problem that is likely to ensure that a complaint will not be sustained. Failure to make an effort to determine whether there are any witnesses to an incident is a sign of an unprofessional complaint investigation process. Witnesses are crucial, since many complaints are “he said/he said” situations without forensic evidence or witnesses.

d. Avoiding Conflicts of Interest

Complaint investigations raise potential conflicts of interest that can lead to bias and/or the perception of bias. Conflicts can arise in a citizen complaint agency. The civilian investigator may be related to, know, or be a friend of the complainant. The consent Decree with the New Jersey State Police adopted a policy stating that “the State shall prohibit any investigator who has a conflict of interest related to a pending investigation for participating in any way in the conduct or review of the investigation.

V. DISPOSITION OF COMPLAINTS

The disposition of the complaint should be made by someone other than the investigator to ensure that it is an objective assessment of the evidence. If the investigator makes the disposition decision there will be an inevitable tendency to shape the investigation toward a predetermined result.

a. Standards for Weighing the Evidence

Traditionally, citizen review boards did not have formal standards for weighing the evidence in a complaint investigation report. The lack of a clear standard allows inconsistent and arbitrary dispositions. The emerging best practice is to use a preponderance of the evidence standard, which is defined as meaning that “it is more likely than not that the alleged act occurred”.

b. Feedback to Complainants and Officers

Lack of feedback about the status of complaints is a major problem among both complainants and police officers.

It is the practice of the Washington, D.C., Office of Police Complaints to place disposition of complaints on its website. The information on the website includes the complaint number, the complaint category, and the complaint examiner's disposition.

This is the recommended procedure for the Cleveland Consent Decree because it provides full disclosure. Full disclosure is in the best interest of the both the complainant and the police officer.

VI. STAFFING AND MANAGING THE COMPLAINT INVESTIGATION PROCESS

a. Staffing and Resources

Lack of staff is potentially a chronic problem with a Citizen's Review Board.

A report on the New York City Citizen's Review Board, by the New York Civil Liberties Union, indicated that "virtually all investigator hires were entry-level employees, who were overwhelmed by a large case back log and a manual record keeping system".

The police auditor in Portland, Oregon, found that the excessive delays in investigating complaints against the police department were largely the result of a lack of sufficient investigators in the Review Board.

The San Francisco Office of Citizen Complaints is unique in having a formal standard for staffing. A 1997 ordinance, enacted by referendum, requires the Office of Citizen Complaints to have one complaint investigator for every 150 sworn officers in the San Francisco Police Department. In 2011 The Office of Citizen Complaints had 16 staff investigators, with average case loads of 23 complaint cases.

The San Francisco standard is informative and it should be considered by the Cleveland Consent Decree.

b. An Investigation Policy and Procedure Manual

Maintaining a professional complaint review process requires a comprehensive policy and procedure manual that includes, among other things, specific directives addressing the various such as locating and interviewing witnesses, standards of proof, and judging witness credibility.

The policy and procedure manual is the basis for training investigators. The standards outlined in the policy and procedure manual results in more consistency in the work product of the investigators.

VII. CONCLUSION

This memo is intended to be an overview of the Citizens Review Board standards that should be included in the proposed Consent Decree.

Citizen's complaints against police officers are an important aspect of police accountability. Citizens have a right to express their dissatisfaction with a government agency, and receive a thorough and fair hearing of their complaint. Further complaints are a valuable for of information for police management, and indicator of problem or problems that need to be corrected.

A few departments have developed standards for oversight.

Some of the best practices of those departments should be incorporated in the proposed Consent Decree for the City of Cleveland.

**RECOMMENDATIONS FOR ADDRESSING THE
COLLECTIVE BARGAINING AGREEMENT
BETWEEN THE CLEVELAND POLICE DEPARTMENT AND THE UNION**

By: Angela Simmons, Esq.

I. PRELIMINARY STATEMENT

The Collaborative for a Safe, Fair and Just Cleveland (CSFJC) produced a “List of Reforms” for inclusion in the pending consent decree between the U.S. Department of Justice (“DOJ”) and the City of Cleveland (“City”). Among the many Reforms was a proposals addressing the Collective Bargaining Agreement (“CBA”) between the City and the Fraternal Order of Police (“FOP”). While no specific revisions were noted, the intended goals are to ensure that the CBA addresses excessive use of force by officers; and to ensure that the CBA aligns with 1) new training requirements and goals that will come out of the consent decree, and 2) community-oriented, bias-free policing best practices.

There are only two apparent means to accomplish goals related, directly or indirectly, to the CBA. First, per the CBA’s Management Rights section, most of the proposed reforms – particularly those regarding training and excessive use of force – can be implemented under the City’s authority to “[t]ake actions to carry out and implement the mission of the City as a unit of government. The City reserves the right to implement new or revised existing policies which do not conflict with the express terms of this Contract.” CBA, Article II. In addition, while it is understood that a consent decree cannot force changes into the CBA, the City can agree with the DOJ to use its bargaining rights to bargain in good faith with the FOP for certain changes to the CBA that will support the overall goals of the consent decree, pursuant to the City’s bargaining power.

II. PROPOSAL

The following is a list of the proposals that can either be accomplished with the City’s own power; or sought by the City during CBA negotiations

- a. Changes per the City’s Authority: Pursuant to the City’s authority under CBA Article II - Management Rights, the City will:
 - i. Create and announce (via press conference or release) its “Mission Statement” to carry out and implement the mission of the City to become a Safe, Fair and Justly Policed City pursuant to the consent decree, as well as its commitment to reforming the Cleveland Police Department.
 - ii. Change or implement policies regarding issues that are believed to foster excessive use of force, e.g.,
 1. “Use of Force” standards,
 2. “bias-free” policing and
 3. “citizen’s rights during police interactions”
 - iii. Require orientation and annual retraining on same and related topics

- iv. Create/revise standards regarding how excessive use of force offenses will constitute just cause for the City to exercise its rights to suspend, discipline, demote or discharge an officer
 - 1. E.g., The criteria for promotions (or other officer perks) will include consideration of the number of excessive use of force rulings an officer has against him/her in the prior 365 days by an alleged victim, or close family member of such victim. More than two findings in a two-year will be ineligible for any promotions(?) for the following three(?) years

b. Negotiation Points:

- i. Pursuant to its bargaining rights, the City will negotiate for any and all changes to the CBA that will support the City's goals as noted in the consent decree
- ii. Proposed changes shall include, but are not limited to:
 - 1. Revision to Article XI – Reprimand:
 - a. Revised to include: Where an officer is found by an independent third party (e.g., Inspector General/New Civil Review Board) to have engaged in excessive use of force resulting in “serious bodily injury,” (to be defined) such finding shall constitute good cause for discharge. Findings of lesser injuries resulting from excessive use of force shall constitute a basis for mandatory minimum 10 day unpaid suspensions.
 - 2. Revisions to Article IV - Officer's Bill of Rights as follows:
 - a. Subsection (f): Complaints against a member, when designated by the ~~Chief~~ *Inspector General/New Civil Review Board* to be unfounded, shall not be included in the member's personnel file, and shall not be used in any subsequent disciplinary proceeding or in making promotion decisions.
 - b. Subsection (l):
 - i. Increase the deadline by which a citizen must file a complaint that can lead discipline against an officer from 6 months to 18 months.
 - ii. Complaints filed by a citizen against an officer shall require only complainant's notarized signature (not that it be handwritten by the complainant. Requiring a notarized signature should be sufficient to establish credibility)

c. Subsection (m):

- i. Allow for disciplinary action based on excessive use of force complaints regardless of timing of complaint;
- ii. The rationale here is that realistically citizens often won't file a complaint so soon after the event (for various reasons, including not being in the right mental capacity to do so). And to allow officers to avoid discipline simply because the injured individual didn't file a complaint within 6 months seems like an arbitrary way to allow officers to avoid accountability.

3. To the extent any other proposed change that is designed to support agreements in the consent decree conflicts with the express terms of the CBA, the City agrees to negotiate in "good faith" (as defined under the National Labor Relations Act collective bargaining provisions), for the inclusion such terms.

iii. In order to ensure that such good faith is used during the negotiations, the City agrees to:

1. Allow a designated member of the Norman S. Minor Bar Association or some other appropriately designated representative to attend such negotiations, as a silent member of the City's representatives.
2. Such attendee would agree in writing to maintain confidentiality of all discussions.
3. The City agrees to meet with the designated representative before and throughout negotiations at mutually agreeable times to discuss the terms, determine progress and otherwise assist with ensuring that goals are reached.